Supreme Court, U.S.
FILED

03 277 JUN 20 2003

No.

Supreme Court of the United States

Benoit Brookens,
Petitioner

v.

Federal Labor Relations Authority
Respondent

On Petition for Writ of Certiorari
To The District of Columbia Court of Appeals

Petition for Writ of Certiorari

Benoit Brookens, II, Esq.
Counsel of Record
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I. Questions Presented for Review

(1) Whether the Department of Labor, when it failed to file exceptions to a final arbitration award to restore an employee to full back pay and benefits, waived any objections it could have raised to enforcement of the award before the FLRA and the U.S. Court of Appeals, pursuant to 5 U.S. C. 7122 (c), except "the failure or excuse to urge the objection is excused because of extraordinary circumstances?"

(2) Whether the DC Circuit's holding—lack of jurisdiction—conflicts with the holding of that of another court, Department of Navy v. FLRA, 815 F.2d 797 (1st Cir. 1987) that the Federal appeals court has jurisdiction to determine whether the action of a federal agency constitutes an abuse of discretion within the meaning of the Administrative Procedure Act. 5 U.S.C. Art. 706(2)(A) as found in Citizen to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-16, 91 S.Ct. 814, 822-23, 28 L.Ed.2d 136 (1970)?

(3) Whether Congress, when it enacted standards for judicial review of federal administrative actions pursuant to Section 5 U.S.C. 706 of the Administrative Procedures Act, intended to exempt "delegated" decisions of the Federal Labor Relations Authority 5 U.S.C. 7122 (c)?

II. List of Parties

Benoit Brookens

American Federation of Government Employees (AFGE), Local 12, (AFL-CIO)

U.S. Department of Labor

Federal Labor Relations Authority (FLRA)

III. Corporate Disclosure Statement

This case does not involve any corporations or their affiliates.

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IV. Table of Authorities

Statutes

5 U.S.C. 706 — 7

5 U.S.C. 7122 — 6,7

5 U.S.C. 7123 — i, 2

28 U.S.C. 2112 — 3

28 U.S.C. 1254 — 3

Treatise

Federal Labor Relations Authority Guide — 6

Decisions

Citizens to Preserve Overton Park v. Volpe 401 U.S. 402, 413-16, 91 S.Ct. 814, 822-23, 28 L.Ed.2d 136 (1970) — i,4

Department of Navy v. FLRA, 815 F.2d 797 (1st Cir. 1987) — 6

Dept. of Navy, Naval Submarine Base, New London and NAGE Local R-1-100, 19 FLRA 250 (1985) — 6

Soldiers' and Airmen's Home and AFGE Local 3090, 15 FLRA 139 (1984) — 5

Citations of the Official and the Unofficial Reports and Orders in the Case

There are no official or unofficial reports and orders in this case.

V. Petition

A. Statement of the Basis for Jurisdiction

i) The Order, the subject of the petition, was entered on January 3, 2003.

ii) The orders denying rehearing and rehearing en banc were entered March 26, 2003.

iii) Statutory Provision providing Jurisdiction of this Court: 5 U.S.C. 7123 (c)

iv) Notification pursuant to Rule 29.4(b) are provided to:

Solicitor General of the United States,
Room 5614,
Department of Justice,
950 Pennsylvania Avenue, NW,
Washington, DC 20530-0001

James Blanford, Esq.,
Counsel for the Federal Labor Relations Authority,
607 14th Street, NW,
Washington, DC 20424-6620

(B) Statutory Provisions

5 U.S.C. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or other wise not in accordance with law;

5 U.S.C. 7122. Exceptions to arbitral award

(b) If no exception to an arbitrator's award is filed under section (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in Section 5596 of this title).

5 U.S.C. 7123 Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than a order under—

(1) section 7112 of this title (involving an award of an arbitrator)..., or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States Court of Appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under section (b) of this section for enforcement, the Authority shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served on the parties involved, and thereupon shall have jurisdiction of the proceeding and the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) of (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 [the Administrative Procedures Act 5 U.S.C. 706] of this title. No objection

that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances...

Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(C) Statement of the Case

In a federal employee arbitration, the arbitrator ordered that a 20 day suspension be "rescinded and expunged" from the grievant's record and the grievant made whole, including interest "for the difference between what he earned and what he would have earned."

The Agency, the U.S. Department of Labor, failed to file exceptions to the award within the prescribed 30 day period and failed to implement the award as ordered. The employee filed an Unfair Labor Practice (ULP) to enforcement the award with the Federal Labor Relations Authority (FLRA). The FLRA's General Counsel, contrary to long standing precedence failed to enforce the arbitration award, and dismissed the employee's petition. The employee sought review of the FLRA's action before the D.C. Court of Appeals pursuant to 5 U.S.C. 706 as arbitrary and capricious. The Appellate Court dismissed the employee's appeal for "lack of jurisdiction" and the employee seeks review before this Court.

(D) Reasons for Granting Review

The Federal Labor-Relations statute[1]—in lieu of authorizing federal worker's the right to strike—provides for mandatory implementation of arbitration awards by federal agencies. Failure of the FLRA to enforce unexcepted arbitration decisions, subverts Congressional intent and undermines the entire federal employee labor-management dispute resolution system which is based upon binding arbitration. In the absence of this Court's review of the FLRA's action, through its designee, the General Counsel, failing to require enforcement of the arbitration award, in derogation of a long line of cases to the contrary, would sanction arbitrary and capricious agency action and abdicate judicial review long established in Citizen to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-16, 91 S.Ct. 814, 822-23, 28 L.Ed.2d 136 (1970).

(E) Argument

(1) *THE LABOR DEPARTMENT MAY NOT RAISE OBJECTIONS TO ENFORCEMENT NOT RAISED IN EXCEPTIONS.*

The only objection—to enforcement of the arbitral award--the Labor Department is allowed by statute is that "the failure or neglect to urge the objection is excused because of extraordinary circumstances", 5 U.S.C. 7123. In this case, the Labor Department failed to argue any extraordinary circumstances before the FLRA and therefore, is barred from raising any other objection before the U.S. Court of Appeals. The language of the statute is quite clear and unambiguous:

---

[1] Federal Service Labor-Management Relations Statute, 5 U.S.C. Arts. 7101-735 (1982 & Supp. III 1985)

> No objection that has not been urged before the Authority, or its designee, shall be considered by the court "unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."

The FLRA, has determined, during Unfair Labor Practice (ULP) proceedings, that an agency's failure to file exceptions to an arbitration award and its failure to implement that award to, in effect, constitute an unfair labor practice. Soldiers' and Airmen's Home and AFGE local 3090, 15 FLRA 139 (1984).

The U.S. Court of Appeals, First Circuit, according to the FLRA Guide, (p. 1898, 1999 Ed.) provides the following;

> The Authority's rule concerning the effect of a failure to file exceptions appears to have been adopted in court, although the court may review the subsequent ULP ruling by the Authority to remedy the failure by the agency to abide by an unexcepted award. Department of Navy v. FLRA, 815 F.2d 797 (1st Cir. 1987).

The FLRA Guide further cites that "If timely exceptions are not filed, the objections will not be entertained as a defense to a ULP proceeding brought to enforce the award. Dept. of Navy, Naval Submarine Base, New London and NAGE Local R-1-100, 19 FLRA 250 (1985)."

For the FLRA and the court to now entertain objections after the Labor Department failed to timely file exceptions to the arbitration award is contrary to the mandates of the statute.

(2) ***THE D.C. COURT'S HOLDING OF LACK OF JURISDICTION CONFLICTS WITH 5 U.S.C. 7122.***

The controlling code provision concerning jurisdiction in this matter is 5 U.S. C. 7122:

> Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

For the Appeals Court, to find otherwise —in contravention of the statute—is error.

To the contrary, the First Circuit found that it had jurisdiction to determine whether the action of the agency constituted an abuse of discretion within the meaning of 5 U.S.C. 706 and provided for in 5 U.S.C. 7122 (c)[2].

[2] Has the employee objected to the arbitration award and filed exceptions or had the Agency done likewise, this matter would before the Court of Appeals on the merits.

(3) *THE CONGRESS DID NOT EXEMPT THE FLRA FROM THE JUDICIAL REVIEW PROVISIONS OF 5 U.S.C 706(2)(a) OF THE ADMINISTRATIVE PROCEDURES ACT.*

The Congress did not expressly exclude the FLRA from the Administrative Procedures Act and, therefore, via a reasonable construction of statutory language, is included in its coverage. The reviewing appeallate court, therefore, then has the authority to perform the following:

> (2) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (3) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or other wise not in accordance with law;

On these grounds, the employee requests that this petition for certiorari be granted.

VI. APPENDIX

Orders

United States of America
FEDERAL LABOR RELATIONS AUTHORITY
607 14th Street NW Washington, DC 20424-0001
(202)482-6600 Fax: (202)482-6608

July 9, 2002

OFFICE OF THE GENERAL COUNSEL

Mr. Benoit Brookens
P.O. Box 2551
Washington, DC 20013-2551

Re: U.S. Department of Labor
Washington, DC
Case No. WA-CA-01-0555

Dear Mr. Brookens:

Your appeal of the dismissal of the unfair labor practice charge in this case by the Washington Regional Director has been carefully considered.

Your appeal has been denied because the appeal has failed to establish that: (1) the Regional Director's decision did not consider material facts that would have resulted in issuance of a complaint; (2) the Regional Director's decision is based on a finding of a material fact that is clearly erroneous; (3) the Regional Director's decision is based upon an

incorrect statement of the applicable rule of law; (4) there is no Authority precedent on the legal issue in the case; or (5) the manner in which the Region conducted the investigation has resulted in prejudicial error.

The appeal has established no ground for reversing the Regional Director's decision or remanding the case for further investigation in accordance with section 2423.11(e) of the General Counsel's regulations. The dismissal letter issued by the Regional Director constitutes the written statement of reasons for not issuing a complaint as required by sectin 7118(a)(1) of the Federal Service Labor-Management Relations Statute. The Regional Director's reason for not issuing a complaint are hereby affirmed. Your appeal is denied and the case closed.

For the General Counsel.

Sincerely yours,

/s/ Richard Zorn
Richard Zorn
Assistant General Counsel
for Appeals

cc: Regional Director, Washington

Laura Stomski, Agency Representative, Labor-Management Relations Center, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5470, Washington, DC 20210

UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 02-1281 September Term, 2002

Benoit Brookens, Petitioner
v.
Federal Labor Relations Authority Respondent

Filed on: (Seal File Jan 3, 2003 Clerk)

BEFORE: Ginsburg, Chief Judge; Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the court's order to show cause filed November 15, 2002 and the opposition to the motion to dismiss, it is
ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to dismissed is granted. This court lacks jurisdiction to review the General Counsel's decision not to issue an unfair labor practice complaint. See Patent Office Professional Association v. FLRA, 128 F.3d 751 (D.C. Dir. 1997); Turgeon v. FLRA, 677 F.2d 937, (D.C. Cir. 1982)

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition of rehearing en banc. See Fed. R. App. P.41(b); D.C. Cir Rule 41.

Per Curiam

UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 02-1281 September Term, 2002

Benoit Brookens,
Petitioner
v.
Federal Labor Relations Authority
Respondent

Filed on:
(Seal
March 26, 2003
Clerk)

BEFORE: Ginsburg, Chief Judge; Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed February 19, 2003, it is ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 02-1281 September Term, 2002

Benoit Brookens,
Petitioner
v.
Federal Labor Relations Authority
Respondent

Filed on:
(Seal
March 26, 2003
Clerk)

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is
ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

Respectfully submitted this 19th day of August 2003,

Benoit Brookens, Esq.
Counsel of Record
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202/575-1166 (eve.)
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